

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 26, 2006 Session

JOE RALPH WALKER v. KARRY DARDEN WALKER

Appeal from the Circuit Court for Montgomery County
No. 50300757 Ross H. Hicks, Judge

No. M2006-00071-COA-R3-CV - Filed on March 22, 2007

This is a divorce case. The trial court declared the parties divorced, divided their marital property, and awarded Karry Darden Walker (“Wife”) rehabilitative alimony. She appeals, contending that the trial court erred (1) in awarding rehabilitative alimony, rather than alimony *in futuro*, and (2) in its division of the marital property. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Karry Darden Walker.

Michael K. Williamson, Clarksville, Tennessee, for the appellee, Joe Ralph Walker.

OPINION

I.

The parties were married on April 1, 1995. At that time, Joe Ralph Walker (“Husband”) was 49 and had been employed as a medical doctor for a number of years. Husband entered the marriage with substantial property, which included rental properties, stocks, and retirement accounts. Wife, who was 36 at the time of the marriage, had some two years of college credit toward a degree in elementary education. She had worked several non-professional jobs; she entered the marriage with essentially no property. Wife had three children from a prior marriage. Two of them lived with the parties. The third lived with the parties for about a year and a half.

During the marriage, Husband’s average income per year from his medical practice and rental properties was approximately \$150,000. Following the marriage, Wife initially stayed home, but she later returned to school, completed work leading to her bachelor’s degree, and began taking classes toward a master’s degree. Wife received a federal educational grant; but Husband paid the

majority of her tuition. Wife testified that Husband forced her to take between 18 and 24 hours each semester. He reasoned that if she took more than the required 12 hours, she would be receiving the excess hours free. Wife testified that the heavy course load was “exhausting.” After she received her bachelor’s degree, Wife worked part-time as a school teacher. She testified that her highest yearly income during the marriage was approximately \$25,000. Wife also testified that, “[w]hen [the parties] first got married,” she gave Husband the child support payments she received from her former husband. She states that these payments were between \$400 and \$618 each month.

According to Wife, Husband was “obsessively [] frugal” and exercised “obsessive” control over the parties’ finances. The parties signed a “contract” shortly after their marriage. Under the terms of this document, Wife received a monthly allowance of \$1,000. Wife purchased groceries, clothing, and gifts for the family with this money. She used \$200 of the monthly allowance to pay private school tuition for her son, who has an attention deficit disorder and other learning disabilities. Wife testified that if she incurred unusual expenses, *e.g.*, expenses for car repairs, she had to present Husband with a receipt before he would reimburse her. As a further example of Husband’s frugality, Wife cites the fact that, when they went on vacations, Husband would require the family to cook meals in their hotel room and eat peanut butter and crackers, rather than going out to restaurants. She also cites one specific trip to the beach when Husband “required the parties to stay at a hotel far away from the beach even though he easily could have afforded to rent a room on the water.”

Wife testified that she suffered from several physical and mental problems during the marriage. She stated that she has ADHD, Tourette’s Syndrome, and Chronic Fatigue Syndrome. Wife said that she told Husband that she had Chronic Fatigue Syndrome prior to their marriage. Wife testified that she began suffering from depression in 1996 or 1997. She stated that she gained about 40 pounds, stayed in bed most days, and was “miserable.” She started seeing a psychiatrist regularly in 1998 and was prescribed anti-depressants and other medications.

In 1996, Husband and Wife bought a cottage in the Cayman Islands. The parties frequently visited the islands together to make repairs to the cottage and for vacations. In the summer of 1999, Wife took a trip to the Cayman Islands without Husband. A month after returning home, Wife told Husband that she had been sexually assaulted while in the Cayman Islands. As a result of this alleged sexual assault, Wife gave birth to a child in March, 2000. The parties remained together and Husband provided support for the child. Wife testified that she began having panic attacks and that her general mental health worsened as a result of the sexual assault. In August, 1999, Wife began a full-time teaching job but decided to quit the job in March, 2000, because of the panic attacks and related emotional problems.

In July, 2003, Wife left the marital residence and returned to the Cayman Islands with her three-year-old child. She did not inform Husband of her whereabouts. Wife stated that she left because of the parties’ growing marital discord and her fragile mental state. She stayed in the Cayman Islands for approximately two months, during which time, according to her, she was again sexually assaulted. She incurred approximately \$45,000 in credit card debt during this two-month stay in the Cayman Islands.

Husband filed for divorce in September, 2003, while Wife was still out of the country. Husband's complaint alleges inappropriate marital conduct and irreconcilable differences. Wife thereafter filed her answer and counterclaim denying that she was guilty of inappropriate marital conduct, admitting that irreconcilable differences existed, and alleging that Husband was guilty of inappropriate marital conduct. The parties agreed to a temporary support order. The order provided that Husband would give Wife \$1,575 per month in temporary support as well as the reasonable cost of daycare for Wife's three-year-old child.

The trial court held a hearing in September, 2005. Thereafter, the court filed its final decree of divorce, which set forth the following factual findings:

These parties were married on April 1, 1995, and separated on July 11, 2003.

[Husband] has paid temporary support to [Wife], pursuant to the terms of an Agreed Pendente Lite Support Order entered on December 29, 2003, through and including the September, 2005, hearing in this cause.

The Court finds that while there was fault on the part of both parties in this cause, the greater fault would lie on the part of [Wife].

The Court specifically finds that the actions of [Wife] greatly contributed to the delay in bringing this matter to trial on a timely basis and, accordingly, prolonged the period during which [Husband] was paying support to [Wife], pursuant to the terms of the December 29, 2003, Temporary Support Order.

The Court specifically finds that [Husband] brought substantial premarital property into the marriage, which was and remains his separate property. The Court further finds that [Wife] brought little or no separate property into the marriage. The Court finds that these parties did accrue substantial assets in the form of real estate holdings, cash, and investment accounts during the marriage, all of which do constitute marital property, to be equitably divided by this Court in these proceedings.

There are no children of this marriage and none are expected.

(Numbering in original omitted). The court's decree then (1) declared the parties divorced; (2) listed the parties' separate and marital property; (3) ordered an equal division of the marital estate, pursuant to which each received \$354,133.58 in assets; (4) ordered Husband to pay Wife rehabilitative alimony in the amount of \$1,200 per month for 12 months; and (5) ordered each party

to pay his/her own attorney's fees. With respect to the Cayman Islands property, the trial court directed Husband to list the property for sale and dispose of it in a commercially reasonable manner. Because Husband mortgaged a tract of his separate property to acquire the Cayman Islands property, the court ordered that the net proceeds from the sale of the property first would be applied to the retirement of that debt. The court ordered that the proceeds next would be used to reimburse Husband for one-half of the mortgage payments made by him from July 1, 2005 to the date of the sale. Any remaining proceeds were to be divided equally between the parties.

On November 2, 2005, Wife filed a motion to alter or amend the judgment, challenging certain real property valuations provided by Husband, the trial court's classification of one of Husband's retirement accounts as separate property, and again requesting an award of attorney's fees. The trial court denied Wife's motion with respect to the classification issue. The court adjusted the valuation of two tracts of real property, an adjustment which resulted in Wife's share being reduced by \$1,457. The court, however, found it inappropriate to require Wife to disgorge this amount and therefore treated the \$1,457 already paid to Wife as an award of attorney's fees. Wife filed a notice of appeal challenging portions of the trial court's judgment.

II.

Wife raises several issues for our review. She first asserts that the trial court erred in awarding her rehabilitative alimony, rather than alimony *in futuro*. She then asserts that the trial court's property division was not equitable, arguing (1) that the court should have awarded her a larger percentage of the marital estate; (2) that the court should have required Husband to pay a percentage of the \$45,000 credit card debt that she incurred while in the Cayman Islands; and (3) that the court erred by not specifying how rental income from the Cayman Islands property would be divided pending the sale of the property.

III.

A.

Our review of this bench trial is *de novo* upon the record of the proceedings below with a presumption of correctness as to the trial court's factual findings, a presumption we must honor "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). The trial court's conclusions of law are not accorded the same deference. **Brumit v. Brumit**, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997).

B.

In a divorce case, the trial court has broad discretion in fashioning an award of spousal support. **Aaron v. Aaron**, 909 S.W.2d 408, 410 (Tenn. 1995); **Anderton v. Anderton**, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). It has the same broad discretion with respect to a division of marital property. **Fisher v. Fisher**, 648 S.W.2d 244, 246 (Tenn. 1983); **Barnhill v. Barnhill**, 826 S.W.2d

443, 449-50 (Tenn. Ct. App. 1991). A trial court abuses its discretion when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted). In evaluating whether a trial court has abused its discretion, we are bound by the principle that the trial court “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) and *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). An appellate court cannot substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

IV.

A.

Wife argues that the trial court should have awarded her alimony *in futuro*. We disagree.

Tennessee law provides four different types of alimony that may be appropriate in combination or alone: “rehabilitative alimony, alimony in futuro, also known as periodic alimony, transitional alimony, or alimony in solido, also known as lump sum alimony.” Tenn. Code Ann. § 36-5-121(d)(1) (2005). There is a statutory bias in favor of rehabilitative alimony. *Id.* at (d)(2); *Robertson v. Robertson*, 76 S.W.3d 337, 340 (Tenn. 2002); *Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn. 2000). Under the statute, rehabilitation

means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse’s standard of living after the divorce to be reasonable comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(d)(2), (e)(1).

Decisions regarding the propriety, nature, and amount of spousal support hinge upon the unique facts of each case and require a careful balancing of the following statutory factors:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earnings capacity to a reasonable level;

- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i)(1)-(12); *Anderton*, 988 S.W.2d at 683 (citing the predecessor to § 36-5-121(i)). The “real need of the [disadvantaged] spouse seeking the support is the single most important factor . . . [and next] the courts most often consider the ability of the obligor spouse to provide support.” *Aaron*, 909 S.W.2d at 410 (citation omitted).

B.

The parties lived together for eight years. While this cannot be categorized as a real short marriage, it certainly is not a union of long duration. *See* Tenn. Code Ann. § 36-5-121(i)(3). Wife is 12 hours away from obtaining a master’s degree. *See id.* at (i)(2). She is in her 40s and testified that she “definitely” anticipates going back to work as a teacher. *See id.* at (i)(4), (6). She received \$354,133.58 in marital assets. *See id.* at (i)(8).

While Wife testified – without any expert or other corroborating evidence – that she suffered from various ailments, there was no proof that any of this would prevent her from returning to work. *See id.* at (i)(4), (5).

Next, we turn to the parties’ standard of living during the marriage. *See id.* at (i)(9). Wife contends that she is entitled to alimony *in futuro*, rather than rehabilitative alimony, because “there is no way that [she] can ever approach the standard of living the parties *should have been able to enjoy* during the marriage, or the standard that is available to Husband after the divorce.” (Emphasis added). *See id.* at (d)(2), (e)(1) (explaining what is meant by rehabilitation). There is no authority to support Wife’s assertion that the court should consider the standard of living that the parties “should have been able to enjoy” during their marriage. What matters is the standard of living actually established during the marriage. *See id.* at (i)(9). Wife testified that Husband was “obsessively[] frugal,” and that she was only given a \$1,000 per month allowance.

Finally, it is important to note that the trial court, although it found fault on the part of both parties, allocated a greater percentage of fault to Wife. *See id.* at (i)(11). *See also Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984) (approving the reduction of alimony for misconduct). The evidence does not preponderate against the trial court’s allocation of fault. Wife left the marital residence without informing Husband of her whereabouts and remained absent for approximately two months. We also note that the trial court specifically found that Wife greatly contributed to a delay in bringing the instant case to trial, a delay which resulted in Husband having to provide Wife with temporary support for a prolonged period of time. *See* Tenn. Code Ann. § 36-5-121(i)(12) (allowing the court to consider “[s]uch other factors . . . as are necessary to consider the equities between the parties.”).

Having considered all relevant factors, we conclude that the evidence does not preponderate against the trial court’s decision to award Wife rehabilitative alimony, rather than periodic alimony.

V.

A.

Wife also contends that the trial court erred in failing to award her a greater percentage of the parties’ marital estate. In other words, she argues that the trial court erred by not allocating her more than half of the parties’ marital property. We disagree.

In an action for divorce, the trial court is charged with the task of making an equitable division of the marital property without regard to fault. Tenn. Code Ann. § 36-4-121(a)(1) (2005). The trial court is under no obligation to divide the parties’ marital estate equally, but rather equitably, for “[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal, or because each party did not receive a share of every item of marital property.” *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (citations omitted). In dividing marital property, courts

are required to allocate interests in a manner consistent with the relevant statutory factors set forth in Tenn. Code Ann. § 36-4-121(c).¹ ***Brown v. Brown***, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

When all of the relevant factors are considered, we cannot say that the trial court abused its discretion when it failed to award Wife more than half of the marital property.

B.

Wife next asserts that the trial court erred in failing to assign Husband all of, or at least a substantial portion of, the \$45,000 credit card debt that Wife incurred in the Cayman Islands. We again disagree.

¹Tenn. Code Ann. § 36-4-121(c) provides as follows:

In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

The Supreme Court has defined marital debts as “all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing.” *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003). It is clear that the debt at issue, which was incurred prior to the parties’ divorce hearing, is marital debt. Wife’s states that the trial court assigned the entire \$45,000 debt to her and cites the “Court’s ruling, [pp.] 14-15” for this statement. Our thorough review of the record, however, fails to establish that the trial court made a specific ruling with respect to this debt. The transcript of the proceeding below references the debt in two places. Husband testified that Wife incurred the debt “before [the parties] separated.” Then, toward the very end of the trial, the following discussion took place:

Husband’s Attorney: Your Honor, I know it’s not normal, [b]ut I don’t know of there being any proof at all about any debt. There’s no proof about a credit card balance and I don’t have any idea what that number is. It’s not in the record.

Wife’s Attorney: [Husband] testified to her – about her spending on credit cards.

The Court: I think [Husband] testified that she had run up \$45,000 in credit card debt that he was unaware of is my recollection.

Husband: I was not aware until 2003.

The Court: Right. . . .

The trial court’s final decree of divorce does not mention the debt. In fact, we have found no mention of the debt in any pleading, including Wife’s proposed ruling and post-trial motion to alter or amend. Furthermore, we have not been made privy to a “Court’s ruling” which specifically assigns the \$45,000 debt to Wife. Assuming that the trial court erred in failing to address the debt entirely, Wife’s failure to bring this error to the trial court’s attention constitutes a waiver of that error as far as this appeal is concerned. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error *or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.*”) (emphasis added).

Even if we assume that the trial court did in fact assign the entire \$45,000 credit card debt to Wife, we cannot say that the evidence preponderates against that decision. Upon determining the extent of marital debt, the trial court should consider the following factors in making an equitable allocation of the debt: (1) the party who incurred the debt; (2) the debt’s purpose; (3) the party who

benefited from the debt; and (4) the party who is in the better position to repay the debt. *Alford*, 120 S.W.3d at 812-13 (citing *Mondelli v. Howard*, 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989)).²

Though Husband's financial resources obviously place him in the better position to repay the debt, the remaining factors – *i.e.*, who incurred the debt, the purpose of the debt, and the party that benefited from the debt – all support the trial court's allocation of the debt to Wife. Wife incurred this debt during a two-month period in the Cayman Islands after she left the marital residence without informing Husband as to where she was going. The record does not divulge the exact purpose of the debt, but in her brief to this Court, Wife states that the debt was incurred to pay living expenses for herself and her three-year-old child. There is no evidence suggesting that Husband directly benefited from the debt. Furthermore, given her equal share of the parties' marital property, Wife has the ability to repay 100% of the debt. This issue is found adverse to Wife.

C.

Lastly, Wife asserts that the trial court erred in failing to specify how to divide rental income generated from the Cayman Islands property pending that property's sale. Wife contends that the court should have divided the rental income equally between the parties. The record is, however, completely devoid of any mention of the Cayman Islands property being used by the parties as rental property. There is evidence that the parties purchased the Cayman Islands property, fixed it up, and stayed at the property on their many vacations to the area. Furthermore, while Husband testified that the parties acquired seven rental properties during the marriage, the properties identified by Husband do not include the Cayman Islands property. There is absolutely no indication in the record that this issue was ever raised before the trial court; therefore, it was and is waived as far as this appeal is concerned. *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 735 (Tenn. 1991). *See also* Tenn. R. App. P. 36(a).

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of that court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Karry Darden Walker.

CHARLES D. SUSANO, JR., JUDGE

²It should be noted that the Supreme Court in *Alford* rejected the *Mondelli* analysis "to the extent that it requires a trial court to engage in a preliminary determination of whether debt incurred during a marriage is marital or separate based on a 'joint benefit' test." 120 S.W.3d at 813. The Court did not, however, reject the debt allocation factors set forth in *Mondelli*.